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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON
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7 KENNETH L. WEAVER,
8 individually and as personal
9 representative of the estate
10 of DEVIN ANDREW WEAVER, and
11 BARBARA WEAVER,

12 Plaintiffs,

13 v.

14 MAUREEN HANSON, in her
15 individual capacity, and
16 GEORGE JACKSON, in his
17 individual capacity,

18 Defendants.

19 NO. CV-06-3022-EFS

20 **ORDER GRANTING IN PART,
21 DENYING IN PART, AND HOLDING
22 IN ABEYANCE IN PART
23 DEFENDANTS' MOTION TO DISMISS
24 AND DENYING AS MOOT WITH LEAVE
25 TO RENEW THE REQUEST FOR
26 SUMMARY JUDGMENT**

27 Before the Court, without oral argument, is Defendants Maureen
28 Hanson and George Jackson's Motion to Dismiss or for Summary Judgment
29 (Ct. Rec. 47). At a Status Conference on March 20, 2007, Defendants
30 advised the Court they were withdrawing their request for summary
31 judgment at this stage, but are pursuing their motion to dismiss. After
32 reviewing the submitted material and relevant authority, the Court is
33 fully informed. The Court grants Mr. Jackson's motion to dismiss on the
34 basis of qualified immunity, grants in part and holds in abeyance in part
35 Ms. Hanson's motion to dismiss, and denies as moot the request for
36 summary judgment.

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1 **A. Factual Background**

2 Plaintiffs' son Devin Weaver died in the Thirtymile Fire. In a
3 prior lawsuit against the fire shelter manufacturers, the defendants
4 argued they were protected from liability based on the mandatory
5 government contract specifications defense (i.e., that the manufacturers
6 were immune from suit because the hazards posed by the fire shelters were
7 due to standards specified by the government agency in the contract).
8 According to the Complaint in this action, Mr. Jackson was aware of
9 United States Forest Service (USFS) tests on the shelters, which revealed
10 that products used in the shelters could decompose and gas the occupant,
11 but that he failed to disclose this information to the medical examiner,
12 who, as a result, failed to test for toxic gas inhalation as a possible
13 cause of death of Devin Weaver. The Complaint also alleges that Ms.
14 Hanson acted as a liaison to the family members and returned certain
15 personal items to the firefighters' families, but that Ms. Hanson
16 destroyed remaining articles from the storage facility, including the
17 fire shelters. Without this material evidence, Plaintiffs settled their
18 claims against the fire shelter manufacturers in the prior lawsuit for
19 less damages than claimed.

20 **B. Legal Authority and Analysis**

21 Defendants ask the Court to dismiss the claims against Mr. Jackson
22 and Ms. Hanson on the grounds that Plaintiffs' *Bivens* claims are barred
23 by qualified immunity because the allegations in the Complaint do not
24 establish a violation of a clearly established constitutional right that
25 can be remedied. Defendants also argue the Court lacks personal
jurisdiction over Mr. Jackson. Plaintiffs oppose the motion, contending

1 Mr. Jackson and Ms. Hanson deprived Plaintiffs of their right of access
2 to the courts, as guaranteed by the Fifth Amendment's Due Process clause,
3 in connection with their underlying claims in the prior lawsuit, and that
4 personal jurisdiction exists over Mr. Jackson.

5 **1. Personal Jurisdiction.**

6 A federal court must have personal jurisdiction over the defendants
7 in a court matter before it can adjudicate a case; accordingly, the Court
8 analyzes the jurisdictional issue prior to the other matters. Because
9 there is no applicable federal statute governing personal jurisdiction,
10 the Court applies Washington law. See *Schwarzenegger v. Fred Martin*
11 *Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); FED. R. Civ. P. 4(k)(1)(A).
12 Washington's long-arm statute permits the exercise of general or specific
13 personal jurisdiction to the full extent of the due process clause of the
14 United States Constitution. *Shute v. Carnival Cruise Lines*, 113 Wash.
15 2d 763 (1989), *rev'd on other grounds*, 499 U.S. 585 (1991). Plaintiff
16 concedes general personal jurisdiction is lacking over Mr. Jackson, who
17 is a resident of Montana, but contends specific personal jurisdiction
18 exists.

19 For a court to exercise personal jurisdiction over a nonresident
20 defendant, the defendant must have at least "minimum contacts" with the
21 relevant forum such that the exercise of jurisdiction "does not offend
22 the notions of fair play and substantial justice." *Int'l Shoe Co. v.*
23 *Washington*, 326 U.S. 310 (1945) (internal quotation marks and citation
24 omitted); *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987). A three-
25 pronged test is used to determine if specific personal jurisdiction is
26 met:

1 (1) The non-resident defendant must purposefully direct his
 2 activities or consummate some transaction with the forum or
 3 resident thereof; or perform some act by which he purposefully
 4 avails himself of the privilege of conducting activities in the
 5 forum, thereby invoking the benefits and protections of its
 6 laws;
 7 (2) the claim must be one which arises out of or relates to the
 8 defendant's forum-related activities; and
 9 (3) the exercise of jurisdiction must comport with fair play
 10 and substantial justice, i.e. it must be reasonable.

11 *Lake*, 817 F.2d at 1421; *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir.
 12 1995). The plaintiff has the burden of establishing specific personal
 13 jurisdiction by making a *prima facie* showing of jurisdictional facts to
 14 withstand the motion to dismiss. *Schwarzenegger*, 374 F.3d at 800; *Atl.
 15 Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1327 (9th Cir. 1985).

16 The first prong of the specific personal jurisdiction test discusses
 17 both purposeful availment and purposeful direction. *Schwarzenegger*, 374
 18 F.3d at 802. Because this is an action sounding in tort and there is no
 19 allegation that Mr. Jackson availed himself of the privileges of
 20 conducting activities within Washington, the purposeful direction
 21 standard applies. See *id.* A separate three-part "effects" test is used
 22 to determine whether a defendant purposefully directed activities with
 23 the forum or a resident thereof: (1) defendant committed an intentional
 24 act, (2) expressly aimed at the forum state, (3) causing harm that the
 25 defendant knows is likely to be suffered in the forum state. *Id.* at 803
 26 (quoting *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111 (9th Cir.
 27 2002), which in turn cites to *Calder*, 465 U.S. 783). The Complaint
 28 alleges:

29 Knowing of the problems associated with the thermal stability,
 30 the amounts of decomposition products and the overall fire
 31 properties of the fire shelters, Defendant George Jackson
 32 concealed material information from the [USFS Employees which

1 included Devin Andrew Weaver] and Medical Examiner who
2 autopsied Devin Weaver and others.

3 (Ct. Rec. 1 at IV ¶¶ 11 & 12.) In Washington, "knowingly" doing an act
4 is equivalent to "intentionally" doing an act, *see Washington v. Travis*,
5 1 Wash. App. 971, 974 (1970); accordingly, the Court concludes Mr.
6 Jackson purportedly committed an intentional act/omission of concealing
7 information.

8 The Court also concludes the Complaint adequately alleges Mr.
9 Jackson's intentional act/omission was aimed at Washington given that the
10 autopsies were performed by the medical examiner in Washington and that
11 the harm resulting from the lack of a toxic gasses evaluation would
12 likely be suffered by the Weavers in Washington. (Ct. Rec. 1 § III ¶ 6
13 & § IV § 15.) Accordingly, Mr. Jackson purposefully directed his
14 activities to Washington and its residents, satisfying the first prong
15 of the specific personal jurisdiction test.

16 The Court finds the other two prongs are satisfied as well.
17 Plaintiffs' claims in this action arise out of and relate to Mr.
18 Jackson's forum-related activities. Lastly, the Court finds the exercise
19 of personal jurisdiction over Mr. Jackson comports with the notions of
20 fair play and substantial justice given that Mr. Jackson served as a team
21 investigator of the Thirtymile Fire, which resulted in the death of four
22 firefighters, and his investigative role brought him to the Eastern
23 District of Washington. For these reasons, the Court concludes, after
24 focusing on the purported relationship between Mr. Jackson, Washington,
25 and this litigation, the Court may exercise personal jurisdiction over
26 Mr. Jackson; Defendants' motion is denied in part. *See Calder v. Jones*,

1 465 U.S. 783, 788 (1984) (citing *Shaffer v. Heitner*, 433 U.S. 310, 316
2 (1945)).

3 **2. Qualified Immunity**

4 Plaintiffs are pursuing a *Bivens* action against Defendants. *Bivens*
5 allows a plaintiff to seek damages against a federal government official
6 if the plaintiff can demonstrate that the federal official violated a
7 clearly established constitutional right of which a reasonable person
8 would have known. *Bivens v. Six Unknown Named Agents of Federal Bureau*
9 *of Narcotics*, 403 U.S. 388 (1971); *Harlow v. Fitzgerald*, 457 U.S. 800,
10 818 (1982). Case law and rules for actions brought pursuant to 42 U.S.C.
11 § 1983, including the immunities recognized, are applicable to *Bivens*
12 actions. *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 (9th cir.
13 1989). Therefore, Defendants ask the Court to grant them qualified
14 immunity. At this stage, the Court must view the facts as alleged by
15 Plaintiffs as true and construe them in the light most favorable to
16 Plaintiffs. See *Harrell v. Cook*, 169 F.3d 428, 431 (7th Cir. 1999).
17 Under this standard, the Court analyzes whether qualified immunity is
18 appropriate.

19 The parties do not dispute that there is a clearly established
20 constitutional right to meaningful access to courts, see *Delew v. Wagner*,
21 143 F.3d 1219, 1222 (9th Cir. 1998); *Chambers v. Baltimore & Ohio R.R.*
22 Co., 207 U.S. 142 (1907); however, the parties dispute whether the
23 Complaint's allegations sufficiently allege a violation of this
24 constitutional right. Defendants maintain the Complaint fails to allege
25 denial of access claims against Mr. Jackson and Ms. Hanson because no
26 court has ever found that government officials have an affirmative duty

1 under the constitution to disclose information of which they are aware
2 and which may be helpful to a party's anticipated or pending lawsuit.
3 Defendants contend that in order for the Complaint to survive the motion
4 to dismiss it needed to have alleged (1) Mr. Jackson failed to provide
5 information to the medical examiner for the express purpose of
6 interfering with the Weaver's products liability case and (2) Ms. Hanson
7 destroyed the fire shelters for the express purpose of interfering with
8 the Weavers' products liability case. As explained below, the Court
9 grants Mr. Jackson qualified immunity, but denies Ms. Hanson qualified
10 immunity at this stage.

11 a. Mr. Jackson

12 The Court recognizes the very action at issue need not have been
13 previously held unlawful, however, the contours of the right to access
14 must have been sufficiently clear so that Defendants understood what they
15 were doing violated the right of access to courts. See *Anderson v.*
16 *Creighton*, 483 U.S. 635, 640 (1987). Denial of meaningful court access
17 decisions have emphasized that the official must engage in affirmative
18 conduct and/or fail to act where there is a duty to act. Based on the
19 case law in July 2001, when Mr. Jackson talked to the medical examiner,
20 there was no clearly established constitutional right which imposed upon
21 government officials a duty to affirmatively disclose information of
22 which they were aware and which might be helpful to a party's pending or
23 anticipated litigation. The Third Circuit succinctly summarized the
24 requirements of a denial of access claim:

25 [the government official] wrongfully and intentionally
26 conceal[s] information crucial to a person's ability to obtain
redress through the courts, and do[es] so for the purpose of
frustrating that right, and that concealment and the delay

1 engendered by it substantially reduce the likelihood of one's
 2 obtaining the relief to which one is otherwise entitled.

3 *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety-Div. of State*
 4 *Police*, 411 F.3d 427, 445 (3d Cir. 2005) (quoting *Swekel v. City of River*
 5 *Rouge*, 119 F.3d 1259, 1262-63 (6th Cir. 1997)) (emphasis in *Gibson*); see
 6 also *Delew*, 143 F.3d at 1222-23; *Crist v. Leippe*, 138 F.3d 801 (9th Cir.
 7 1998) (destruction of evidence must be intentional). Applying these
 8 principles, the Second Circuit in *Barrett v. United States*, 798 F.2d 565
 9 (2d Cir. 1986), denied government prosecutors qualified immunity at the
 10 summary judgment stage given that there was sufficient evidence to show
 11 that the prosecutors "crossed the line from mere silence to active
 12 interference with the estate's rights in its pending Court of Claims
 13 action." *Id.* at 576.

14 Unlike in *Barrett*, there is no allegation that Mr. Jackson "actually
 15 interfered" with Plaintiffs' litigation. The Complaint fails to allege
 16 any affirmative conduct by Mr. Jackson; rather it alleges Mr. Jackson
 17 "concealed material information" by failing to disclose such to the
 18 medical examiner, i.e. an omission. The Court concludes there is no
 19 allegation that Mr. Jackson "crossed the line from mere silence to active
 20 interference," see *Barrett*, 798 F.2d at 576.¹ Further, there is no

21 ¹ Plaintiffs contend Mr. Jackson's conduct resulted in spoliation
 22 of evidence, while also acknowledging that Washington appellate courts
 23 have not yet recognized an independent tort of spoliation. Plaintiffs
 24 cite to a number of districts who have recognized such a tort, see *Smith*
 25 *v. Atkinson*, 711 So. 2d 429 (Ala. 2000), and *Hanna v. Heeter*, 584 S.E.2d
 26 560 (W. Va. 2003); yet, there are also districts that have not, see
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1 allegation that Mr. Jackson had an affirmative duty to investigate the
2 cause of Devin Weaver's death, unlike the affirmative duty the law
3 enforcement defendant in *Swekel* had to investigate the theft. 119 F.3d
4 at 1262-63. Plaintiffs do argue that Mr. Jackson had an affirmative duty
5 to disclose the information he knew about the fire shelters to the
6 medical examiner, relying upon *Van Dinter v. Orr*, 157 Wash. 2d 329, 334
7 (2006). However, *Van Dinter* discussed an individual's obligation to
8 disclose information in a business transaction setting; this is not the
9 situation alleged in the instant Complaint.

10 Accordingly, the Court concludes Mr. Jackson's alleged conduct did
11 not violate the clearly established right of meaningful access to courts.
12 Mr. Jackson's motion for dismissal based on qualified immunity is
13 granted.

14 b. Ms. Hanson

15 Plaintiffs seek damages against Ms. Hanson based on different facts
16 than Mr. Jackson. Plaintiffs allege Ms. Hanson "[k]nowing of the
17 Plaintiffs' requests for the fire shelter and other information, . . .
18 destroyed the fire shelter that Devin Andrew Weaver died in along with

19
20 *Cedars-Sinai Med. Ctr. v. Superior Ct.*, 18 Cal. 4th 1 (Cal. 1998), and
21 *Goff v. Harold Ives Trucking Co., Inc.*, 27 S.W.3d 387 (Ark. 2000).
22 Therefore, at the present time, the Court concludes a tort of spoliation
23 does not exist in Washington. Regardless, whether Mr. Jackson's omission
24 amounted to spoliation is irrelevant to whether his omission was
25 wrongfully and intentionally concealing crucial information under the
26 right to access constitutional claim.

1 other evidence which had been preserved by the USFS until the Weaver
 2 request for information and production." (Ct. Rec. 1 § IV ¶ 23.)
 3 Although the Complaint does not specifically allege Ms. Hanson
 4 "wrongfully and intentionally conceal[ed] information crucial" to
 5 Plaintiffs' recovery in the underlying lawsuit, the Court concludes, when
 6 reading the Complaint as a whole under the dismissal standard, that the
 7 Complaint does sufficiently state that Ms. Hanson's affirmative conduct
 8 of destroying the fire shelter was done wrongfully and intentionally for
 9 the purpose of frustrating Plaintiffs' ability to obtain redress through
 10 the courts. Whether Plaintiffs are able to factually establish such is
 11 a question for another day. Accordingly, at this stage, Defendant
 12 Hanson's motion to dismiss based on qualified immunity is denied.

13 **3. Remedy**

14 Defendants maintain the Complaint fails to specify a remedy as is
 15 required by *Christopher v. Harbury*, 536 U.S. 403 (2002), and recognized
 16 by the Tenth Circuit in *Jennings v. City of Stillwater*, 383 F.3d 1199
 17 (10th Cir. 2004). The Complaint here alleges:

18 [Plaintiffs/Estate of Devin Weaver] suffered an economic loss
 19 and loss of earning potential exceeding \$2,000,000. The
 20 Weavers, therefore, settled the underlying case for an amount
 21 far less than what they would have been able to prove had
 22 evidence not been destroyed but had been preserved. The
 23 difference is in excess of any minimum jurisdiction of this
 24 court.

25 For any other damages allowable under Washington law, including
 26 but not limited to damages under the Washington state's general
 survival statute . . . in the total sum of \$1,000,000.

The Court finds this satisfies *Christopher v. Harbury*, 536 U.S. 416 (2001). In *Harbury*, the Supreme Court stated, "when the access claim (like this one) looks backward, the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit

1 that may yet be brought." *Id.* at 415. The purpose of such pleading
2 requirement is to give "fair notice to the defendant . . . to hedge
3 against the risk that an access claim be tried all the way through, only
4 to find that the court can award no remedy that the plaintiff could not
5 have been awarded on a presently existing claim." *Id.* at 416. Here,
6 Plaintiffs satisfied the concern set forth in *Harbury* by alleging that
7 Plaintiffs' economic damages exceed \$75,000 and are approximately
8 \$2,000,000, and are based on the diminishment in the value of their claim
9 in the prior lawsuit.

10 The plaintiff in *Jennings*, the plaintiff in *Harbury*, also failed to
11 identify an available remedy. The Tenth Circuit in *Jennings* stated:

12 Plaintiff has not specifically alleged, or presented evidence,
13 that the settlement amount was inadequate on account of the
14 government's actions so as to deny her meaningful relief. At
15 several points in her appellate briefs, she alludes to such a
16 claim. . . . But her complaint contains no such allegation,
17 and the record contains no evidence on the point. Moreover,
18 in light of confidentiality of Plaintiff's settlement, there
19 is no way such a claim could be evaluated.
20

21 383 F.3d 1199, 1209. Here, Plaintiffs did allege a specific sought after
22 remedy in their Complaint. Like *Jennings* though, Plaintiffs did enter
23 into a confidential settlement. The Court recognizes the Ninth Circuit
24 allows a district court to review a confidential settlement, see *Ex Parte*
25 *General Brewing Co. v. Law Firm of Gordon, Thomas, Honeywell Malanca*
26 *Peterson & O'Hearn*, 694 F.2d 190 (9th Cir. 1982) (District court reviewed
settlement agreements *in camera* to determine what attorneys fees requests
should be granted.); however, Plaintiffs have not identified whether the
instant settlement agreement allows for such judicial review and/or
whether the other party to the agreement is agreeable to this Court
reviewing the settlement agreement. Without reviewing the settlement

1 agreement, the Court will be unable to perform the "accounting function"
2 to determine the difference between the Weavers' actual settlement
3 recovery and any jury award in this action. Therefore, Defendants'
4 motion is held in abeyance for two weeks to allow Plaintiffs to file
5 ex parte a true and correct copy of the settlement agreement for *in camera*
6 review by the Court.

7 For the above reasons, **IT IS HEREBY ORDERED:** Defendants' Motion to
8 Dismiss or for Summary Judgment (**Ct. Rec. 47**) is **GRANTED IN PART**
9 (qualified immunity for Mr. Jackson), **DENIED IN PART** (personal
10 jurisdiction and Ms. Hanson denied qualified immunity), **HELD IN ABEYANCE**
11 **IN PART** (Plaintiff shall file ex parte a copy of settlement agreement
12 within one week of entry of this Order), **and DENIED IN PART WITH LEAVE**
13 **TO RENEW following discovery** (request for summary judgment).

14 **IT IS SO ORDERED.** The District Court Executive is directed to:

15 (A) Enter this Order; and
16 (B) Provide copies to the parties.

17 **DATED** this 30th day of August 2007.

18
19 _____ S/ Edward F. Shea _____
20 EDWARD F. SHEA
United States District Judge

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